(4)

No. 94-1719

MAY 1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MOUNTAINWEST FINANCIAL CORPORATION,

Petitioner,

—v.—

VISA U.S.A. INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MOTION OF 27 NATIONAL, STATE AND LOCAL CONSUMER ORGANIZATIONS* FOR LEAVE TO FILE BRIEF *AMICI CURIAE* IN SUPPORT OF PETITIONER AND BRIEF *AMICI CURIAE*

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May 19, 1995

* *Full list on inside front cover*

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Consumer organizations participating as Amici Curiae

American Council on Consumer Awareness
Blount County Community Action Agency
Center for Public Representation
Citizen Alert
Colorado River Community Action Council
Communities Organized to Improve Life, Inc.
Conference of Consumer Organizations
Consumer Education & Protection Association for Kansans
Consumer Educators of Michigan
Consumer Fraud Watch, Inc.
Consumer Information Center, Springfield Action Commission
Consumer Protection Association
Harlem Consumer Education Council
Jamaica Consumer Education Council
Kling Center
Lynn Economic Opportunity, Inc.
Massachusetts Consumers Association
Michigan Consumer Federation
National African American Consumer Education Organization
Network for Professional Women
New Opportunities for Waterbury, Inc.
North Carolina Consumers Council
North Central-Flint Hills Area Agency on Aging
Northeast COMBAT, Inc.
Pennsylvania Citizens Consumer Council
United Communities Against Poverty
Wisconsin Consumers League

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To The United States Court Of Appeals
For The Tenth Circuit**

MOTION OF 27 NATIONAL, STATE AND LOCAL CONSUMER ORGANIZATIONS FOR LEAVE TO FILE BRIEF AMICI CURIAE IN SUPPORT OF PETITIONER

The 27 consumer organizations listed on the inside front cover hereby respectfully move for leave to file the attached brief *amici curiae* in this case. The consent of the attorneys for the Petitioner has been received. The consent of the attorneys for the Respondent was requested but not obtained as of the time this brief was printed.

Amici are 27 national, state and local consumer organizations with diverse political, economic and social agendas. One issue of surpassing concern for the constituents of all amici is the subject of general purpose charge cards and

those cards' fees and expenses. Charge cards play a dominant role in the American economy. At least one general purpose charge card is carried by a substantial majority of American consumers, and in 1993 alone more than $474 billion worth of goods and services were purchased with charge cards. It is estimated that by the year 2000, the annual volume of general purpose charge card transactions will top $1.2 trillion.

Most consumers take advantage of the charge cards' credit-granting feature. Approximately 68 percent of charge card users have revolving charge card debt; in 1994, the aggregate debt owed by consumers on general purpose charge card accounts topped $280 billion, more money than American consumers owed on automobile loans.

Of great significance for consumers, this borrowing takes place in a remarkably uncompetitive market. As of the time of this trial, the ten largest issuers of Visa and MasterCard, who accounted for half of the market, all charged nearly the same high interest rates and same substantial annual fees. Moreover, charge card interest rates have remained high despite the fall in overall interest rates over the past several years. In all, consumers paid over $30 billion in charge card interest charges in 1993, and another $3 billion in annual charge card fees.

Amici thus have a substantial interest in increased competition in the charge card market. Unfortunately, Visa's challenged bylaw prevents such competition by excluding Dean Witter's aggressively priced and marketed Prime Option Visa card and by effectively preventing other firms from introducing new products to compete with Visa.

Thus, amici respectfully seek leave to file their brief *amici curiae* in support of Petitioner's Petition for Writ of Certiorari

to demonstrate the adverse effects on consumers and competition in the general purpose charge card market posed by Visa's bylaw.

Respectfully submitted,

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May 19, 1995

QUESTIONS PRESENTED

1. In order to be ancillary under the rule of reason, must a joint venture's restraint of trade be: (a) reasonably related to the venture's business interests, irrespective of efficiencies; (b) reasonably necessary to enhance the venture's efficiencies; or (c) the least restrictive alternative to enhance the venture's efficiencies?

2. In evaluating a joint venture's restraint of trade under the rule of reason, is the market power of the venture: (a) an important factor but not a threshold requirement; (b) a threshold requirement, which can be satisfied by a showing that the venture members possess a large collective market share and that the venture can disadvantage competitors; or (c) an elevated threshold requirement, which disregards large collective market share and requires a showing that exclusion from the venture effectively entails exclusion from the relevant market?

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To The United States Court Of Appeals
For The Tenth Circuit

BRIEF OF 27 NATIONAL, STATE AND LOCAL CONSUMER ORGANIZATIONS AS AMICI CURIAE IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF AMICI CURIAE

Amici are 27 consumer organizations of diverse constituencies and interests. For example, the American Council on Consumer Awareness, headquartered in St. Paul, Minnesota, is dedicated to providing education on consumer issues. By contrast, the North Central-Flint Hills Area Agency on Aging provides assistance and advocacy for senior citizens in an 18-county region in central Kansas.

One issue of surpassing concern for the constituents of all amici is the subject of general purpose charge cards and those cards' fees and expenses. Charge cards play a dominant role in the American economy. Nearly two-thirds of American

consumers over the age of 18 own at least one general purpose charge card, and the average card-carrying consumer has two or three such cards in his or her wallet. Moreover, the annual volume of transactions financed by charge cards is enormous: in 1993, general purpose charge cards were involved in 5.60 billion transactions with a total value of over $474 billion.

The pervasive importance of charge cards continues to grow rapidly. It is estimated that by the year 2000, the annual volume of general purpose charge card transactions will top $1.2 trillion. Also in that year, nearly one-half of all consumer payments that take place outside of the home will be financed by plastic -- primarily charge cards and their more recent cousins, "debit" cards. (By comparison, cash will be involved in only about one-third of such transactions.)

While some consumers use charge cards merely for their convenience, most take advantage of the cards' credit-granting feature. Approximately 68 percent of charge card users have revolving credit card debt; in 1994, the aggregate debt owed by consumers on general purpose charge card accounts topped $280 billion, more money than American consumers owed on automobile loans. Of great significance for consumers, this borrowing takes place in a remarkably uncompetitive market. At the time of trial in this case, the ten largest national issuers of Visa and MasterCard cards -- who collectively accounted for fully half of all such cards -- followed a nearly uniform pricing structure:

	Issuer	*Interest Rate*	*Annual Fee*
1.	Citicorp	19.8%	$20
2.	First Chicago	19.8%	$20
3.	AT&T Universal	15.9%	$20
4.	Chase Manhattan	19.8%	$20
5.	MBNA America	18.9%	$20
6.	Bank of America	19.8%	$18
7.	Nationsbank	17.9%	$18
8.	Chemical Bank	17.8%	$20
9.	Banc One	19.8%	$20
10.	Wells Fargo Bank	19.8%	$18

None of these national issuers offered the combination of low rates and no annual fee envisioned by Dean Witter's Prime Option Visa card.

Moreover, credit card interest rates have remained high despite the fall in overall interest rates over the past several years. In March 1995, the average consumer dollar outstanding on a general purpose credit card account was subject to an 18.2 percent interest rate.

In all, consumers paid over $30 billion in credit card interest charges in 1993, and another $3 billion in annual credit card fees. Thus, the consumers represented by amici possess a substantial bottom-line interest in securing increased competition in the general purpose charge card market. Visa's Bylaw 2.06 has attracted substantial attention among consumer advocates because of its plain restraining effect on competition in this market, and its exclusion of Dean Witter's aggressively priced and marketed Prime Option Visa card. Amici therefore submit this brief to present the consumer perspective on the Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

Consumers have a large stake in the outcome of this case and an even larger stake in the resolution of the legal issues raised by the Tenth Circuit's decision. For both reasons, the Court will serve consumers well by granting the petition and clarifying the confusion and conflict that currently exist among the lower courts regarding the proper analysis of joint venture restraints.

Consumers benefit from efficient joint ventures such as Visa that reduce costs or enable a consortium of providers to supply a more attractive product than any single firm acting alone. As a general matter, consumers benefit when venture-wide output (measured by either quantity or quality) is increased. However, if such a venture goes beyond those activities which enhance efficiency, the potential for mischief is enormous. Such a venture can use the threat of exclusion or expulsion to impose the collective will of the group upon individual members and prospective members. Restraints of trade such as joint price setting and exclusivity requirements are just two obvious examples. Competitive harms can be significant even if individual venture members continue to compete with each other in other respects.

Therefore, it is vital to consumer interests that the resulting tension between competition and cooperation be resolved in a manner that serves consumer welfare. To date, this Court has had few opportunities to pass upon the proper accommodation of these concerns, and the lower courts have interpreted the Court's pronouncements in a variety of conflicting ways. This case illustrates the harms that consumers suffer when courts adopt improper legal standards.

The Tenth Circuit's market power analysis wrongly assumes that competitive harm cannot result from a joint venture exclusion where the venture has many members and the excluded firm remains in the market. Contrary to the court's analysis, economists have long recognized -- and this case

amply illustrates -- that pervasive harm to consumers can result from such exclusions. Similarly, the Tenth Circuit's misguided analysis of Visa's asserted "free riding" justification misunderstands the nature of the economic concern with free riders, and improperly ignores the existence of readily available less restrictive alternatives to meet Visa's asserted concerns. In both respects, the Tenth Circuit's rules allow joint ventures to protect their profits at the expense of consumers.

Most directly, the outcome of this case affects consumers in their use of charge cards. As detailed in the Statement of Interest of Amici Curiae, the general purpose charge card market is one of surpassing importance for American consumers. Prices in this market remain far above competitive levels, and the prices charged by the largest issuers of Visa and MasterCard cards have been little affected by competition from lower-priced alternatives offered by smaller issuers. The restraint of trade at issue here clearly was designed to perpetuate this lack of competition by cutting off the threat of increased price competition from aggressive and efficient large-scale national charge card issuers. If Visa's unreasonable restraint of trade is allowed to stand, consumers will be harmed greatly.

Although the Tenth Circuit's decision clearly would be worth the Court's attention even if this were the only market in which the decision's consequences are felt, the consequences are in fact much broader. The legal issues this decision raises are central to rule of reason analysis of joint ventures. Joint ventures, and especially network joint ventures, play an increasingly important role in numerous industries, from banking (ATMs, check clearinghouses, charge cards), to real estate (multiple listing services), to florists (nationwide delivery service). Such ventures also provide disparate other services in industries ranging from health care (provider networks) to newspapers ("wire" service), to telecommunications (cellular and long distance service) to computers and other electronics (via hardware and software standard setting).

In the face of these burgeoning opportunities for -- and threats to -- consumer welfare, consumers and businesses alike need clear and sensible antitrust rules. It is hard to imagine issues more central than those raised by the Tenth Circuit decision in this case: 1) the role and definition of market power in joint venture cases; and 2) the legal and economic bases on which joint ventures can defend the legitimacy of purportedly "ancillary" restraints.

I. The Tenth Circuit's Market Power Standard Improperly Ignores Anticompetitive Conduct That Harms Consumers.

A central purpose of antitrust law is to protect consumers from injuries caused by the exercise of market power. Market power can be asserted through explicit collusion on price, agreements to withhold new products, or concerted attempts to inhibit the competition of aggressive, efficient or innovative rivals. In each instance the result is the same: consumers either pay higher prices for the same goods, or are forced to accept goods or services inferior to those that unrestricted competition would have produced.

The exclusionary bylaw challenged by Petitioner in this case represents an attempt by a joint venture that controls a dominant share of the relevant market to inhibit an aggressive and efficient rival which seeks to expand competition to the benefit of consumers. Treading in the famously uncharted waters of rule of reason market power analysis,[1] the Tenth Circuit blessed Visa's bylaw as a matter of law because it did not exclude Dean Witter entirely from the relevant market and because Visa's 6000 members were too numerous to collude directly on price. *See SCFC ILC, Inc. v. Visa U.S.A. Inc.*, 36

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[1] *See, e.g., Capital Imaging Assocs. v. Mohawk Valley Medical Assocs.*, 996 F.2d 537, 546 (2d Cir.), *cert. denied*, 114 S. Ct. 388 (1993); *National Bancard Corp. v. Visa U.S.A., Inc.*, 779 F.2d 592, 603 (11th Cir.), *cert. denied*, 479 U.S. 923 (1986).

F.3d 958, 968 (10th Cir. 1994). This analysis portends great harm for consumers.

To take an example based on this Court's jurisprudence,[2] consider a large and powerful joint venture in the construction industry that dominates its market and creates efficiencies giving members substantial advantages over non-members. The joint venture, whose members have traditionally produced steel conduit, decides to forbid its members from producing a new product, plastic conduit, which many consumers would prefer. This action will be profitable for the venture members: even though the exclusion does not make them wealthier or raise prices above current levels, it staves off a new source of competition -- thus helping them avoid losing market share that they already have -- and avoids a downward pressure on price.

An upstart firm wants to produce the new plastic conduit, which would increase output and thus be efficiency-enhancing. In view of the joint venture's rule, the firm is faced with the choice of abandoning the new product or striking out on its own and forgoing the efficiencies and market acceptance available to venture members. The Tenth Circuit's analysis holds that this choice poses no antitrust concern as a matter of law because the upstart will remain in the market (either inside or outside the venture) and because the venture's members have not directly colluded on price. But this is a demonstrably incomplete view of antitrust.

First, excluding plastic is at least as harmful to consumers as fixing prices. The exclusionary action denies consumers the benefits of new products that a competitive market would produce. Considering the quality and variety of products that would otherwise be available in the market, the decision to exclude plastic conduit is "output reducing" just as much as a decision to raise the price of steel conduit.

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[2] *See Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988).

Second, the structural problems that would make collusion impossible do not affect the agreement to exclude plastic. Six thousand competitors would be unlikely to adhere to a cartel agreement. Moreover, monitoring the pricing of each member would be difficult in the best of circumstances, and would be impossible if pricing could be kept secret.[3] But these limitations have no application to an agreement preventing venture members from offering a certain product, from competing outside the venture, or excluding a firm from the venture altogether. A firm cannot clandestinely be a venture member or offer a competing product. Finally, any price-fixing agreement among venturers would be illegal per se, so enforcement would have to be kept secret, something that 6000 members would undoubtedly make impossible. But the Tenth Circuit's rule in this case makes enforcement of the exclusion rule legal, thus permitting it to be brought out in the open and even enforced through the legal process.

Third, anticompetitive injury occurs even if the upstart firm remains in the market. If the firm chooses to abandon the plastic conduit and become or remain a venture member, consumers will lose the benefits that plastic would have provided. If, on the other hand, the firm attempts to sell plastic on its own, its inability to gain from the venture's efficiencies means that its costs (and therefore prices) will be higher and its market penetration will be lower. Once again, consumers will suffer.

Fourth, the restraint will be most harmful to consumers if it takes the form of a full exclusivity requirement, under which venture members may not produce either steel or plastic conduit in competition with the venture. As long as members are free to compete outside the venture, individual firms seeking profits have an incentive to enlarge their *non*-venture

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[3] *See* 2A Phillip E. Areeda, Herbert Hovenkamp & John L. Solow, *Antitrust Law* ¶ 405 (1995); Herbert Hovenkamp, *Federal Antitrust Policy* §§ 4.1-4.2 (1994).

output in order to compensate for any reduction in output within the venture.[4] In addition, where operating both inside and outside a joint venture is efficient, preventing members from operating in that manner reduces efficiency and artificially limits output expansion. An exclusivity rule thus prevents efficient competition.[5]

Visa's exclusionary bylaw harms consumers in all these ways. The bylaw prevents Dean Witter and all other firms (except for Citicorp) from following an efficient strategy of issuing both a Visa card and a proprietary card. The bylaw thus reduces the competition that takes place both inside the Visa venture (because Dean Witter is precluded from offering its low-priced Visa card) and outside the Visa venture (because other firms are discouraged by the threat of exclusion or expulsion from Visa from offering new proprietary cards).[6]

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[4] Suppose a ten-firm cartel attempts to reduce output from the competitive 100 units to 70 units, but that under the cartel's rules each member is entitled to make unlimited non-cartel sales. One or more members can profit by increasing non-cartel sales until the 30 units are added back into the market, and the cartel will fail. Alternatively, suppose the cartel agrees to withhold a particular innovation from the market; if the innovation is profitable, one or more members will offer it with respect to its non-cartel sales and once again the agreement will fail. In order to succeed, the cartel must prevent its members from making non-cartel sales or innovations.

[5] *Cf. Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332, 359-61 (1982) (Powell, J., dissenting); *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1, 5, 11 (1979). *See also* Department of Justice & Federal Trade Commission, *Statements of Enforcement Policy and Analytical Principles Relating to Health Care and Antitrust*, Statement 8 (1994) (indicating much closer scrutiny of "exclusive" joint ventures that prohibit their members from competing outside the venture).

[6] This Court has recognized in other contexts the harm to consumers that can result from collective actions by a large number

(continued...)

Consumers are therefore denied the benefit (here in the form of lower prices) that would result from Dean Witter's inclusion as a Visa member. Moreover, the exclusion raises the costs of Dean Witter and all other firms that contemplate a "multi-card" strategy by denying them the efficiencies of venture membership and thereby further perpetuates high prices in this important industry. The fact that Visa's bylaw operates as an exclusivity rule compounds these ills by preventing any other Visa member from making up for the loss in output caused by Dean Witter's exclusion.

The Court should grant the petition to protect consumers from the Tenth Circuit's misguided market power analysis that ignores these important competitive harms as a matter of law.

II. The Tenth Circuit's "Efficiency Justification" Standard Actually Ignores Efficiency and Uncritically Accepts an Inapposite Business Justification for Naked, Anticompetitive Conduct.

The Tenth Circuit's decision assessed Visa's asserted justification for Bylaw 2.06 based on a legal standard that uncritically accepted Visa's pursuit of maximum profits for its members without regard to whether its conduct is efficient. As a result, the court validated a restraint of trade that actually sacrifices Visa's own efficiency as a network joint venture in order to insulate its individual members from increased price competition from firms seeking to operate more efficiently. Left unreviewed by this Court, the Tenth Circuit's analysis

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[6] (...continued)
of competitors that fall short of collusive price-fixing. *See, e.g., National Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Oklahoma*, 468 U.S. 85 (1984) (striking down output limitation agreement among collegiate athletic association with 850 members); *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679 (1978) (striking down agreement among 12,000 consulting engineers to refrain from competitive bidding).

promises higher prices for consumers both from Visa's restraint and from future restraints judged under similarly nonchalant rules.

A. Consumers Require Antitrust Rules that Distinguish Legitimate from Feigned Free Rider Claims.

In validating Visa's restraint as a matter of law, the Tenth Circuit accepted Visa's assertion that its restraint was necessary to prevent free riding. Properly defined, free riding is competitively harmful because it reduces the incentives to engage in innovation.[7] If innovators incur all the costs of innovation while copiers take all the rewards, then no one will innovate.[8]

Consumers are thus properly concerned that free riding be controlled, and joint venture exclusion rules can sometimes

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[7] On why free riding leads to reduced output, see *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 222-23 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987); *Premier Elec. Constr. Co. v. National Elec. Contractors Ass'n, Inc.*, 814 F.2d 358, 369-70 (7th Cir. 1987); Herbert Hovenkamp, *Federal Antitrust Policy* §§ 5.2b, 11.3a; E. Thomas Sullivan & Jeffrey L. Harrison, *Understanding Antitrust and Its Economic Implications* § 4.14(A)(3) (2d ed. 1994).

[8] For example, suppose Chrysler and Ford join to develop a new emission control system. General Motors is asked to participate but declines. Later the device proves successful and GM requests a license to use it. An antitrust rule forcing Chrysler and Ford to accommodate GM would permit free riding: any firm that knew it could forgo the high-risk developmental phase of a venture and sign on during the successful production phase would wait until later. The joint venture might never be established at all, and consumers would never receive the benefit of its intended innovations. *See Polk Bros., Inc. v. Forest City Enters., Inc.*, 776 F.2d 185, 189-90 (7th Cir. 1985); Herbert Hovenkamp, *Federal Antitrust Policy* § 5.2b.

accomplish this result. But because this Court has never had an opportunity to discuss the appropriate scope of free rider defenses to horizontal restraints, the Tenth Circuit misunderstood and misapplied the concept. While the court properly recognized that free riding was an "efficiency justification," it completely neglected to inquire whether Visa's restraint actually *served* to prevent free riding. As the jury found in returning its verdict for Dean Witter, it plainly does not.

The thrust of Visa's free riding argument -- accepted by the Tenth Circuit -- is that the bylaw is needed for "the protection of property rights[, which] is essential to encourage innovation and risk-taking in business." *SCFC ILC, Inc. v. Visa U.S.A. Inc.*, 819 F. Supp. 956, 984, 987 (D. Utah 1993), *rev'd*, 36 F.3d 958 (10th Cir. 1994). While in many contexts the protection of property rights may indeed justify a refusal to deal, the argument has no application here. The hallmark of true free riding is reduced output. To establish a free rider defense to Bylaw 2.06, therefore, Visa should have been required to explain how the admission of Dean Witter would reduce the output of Visa cards or would reduce the incentive to form credit card networks in the first place.

It manifestly does neither. Dean Witter's aggressive marketing of its Visa card would result in increased rather than decreased Visa output. Moreover, Visa is not the type of venture, like a research joint venture, that must be able to enforce closed membership rules to be economically viable. To the contrary, Visa is a classic example of a network joint venture whose efficiency is enhanced by the addition of new members, as the Visa card becomes ever more widely accepted by consumers and merchants. This is why, except for the restraint at issue here, Visa has always followed an open membership policy. By ignoring the fact that Visa's purported justification had nothing to do with the challenged restraint, the Tenth Circuit allowed Visa to "protect" its "property rights" at

the expense of consumers.[9]

The consumer interest in antitrust is best served by a rule requiring that free rider defenses be capable of articulation and defined with care. Not all relationships between producers constitute free riding.[10] Further, within the ordinary range

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[9] The other elements of Visa's free rider defense credited by the Tenth Circuit are similarly inapplicable. Visa claimed that (1) complete separation of systems would encourage more intersystem competition; (2) further growth by Visa might encourage more government regulation; (3) after Visa members were permitted to offer MasterCard cards, the two competed with each other less aggressively; (4) a big player like Dean Witter in Visa would make life harder for smaller members; and (5) Dean Witter might become a Visa Board member and then might have access to confidential information. *SCFC ILC*, 36 F.3d at 969-70.

Items 1-4 have nothing whatsoever to do with free riding. Both (1) and (3) are claims that the bylaw created more competition with other systems. If these claims were true, then one is hard pressed to explain why Visa wanted the bylaw to begin with: rational economic actors do not adopt policies that force them to compete more strenuously. In any event, they are not claims of free riding. Item (2) is not, by itself, an antitrust argument at all. Finally, item (4) is simply a claim that the market would have been *more* competitive rather than less after Dean Witter's entry into Visa.

Only item (5), the expressed concern with confidential information, sounds like free riding. But there was no elaboration of the type of information that Discover might use to Visa's disadvantage and no reason given why this claim had to be accepted as a matter of law simply because it was asserted. Further, no consideration was given to whether less restrictive alternative rules could have been formulated that would accomplish the same result without the accompanying injury to competition. Finally, the presence of Citicorp -- issuer of the competing Diners Club and Carte Blanche proprietary cards -- on the Visa Board fatally undermines the bona fides of this claim.

[10] For example, free riding must be distinguished from simple

(continued...)

where reasonable minds can differ, the fact finder must be able to determine the relevance and truthfulness of free rider claims. Otherwise, free rider defenses will acquire a kind of protected status that shields restraints from antitrust scrutiny whenever free riding is merely asserted.[11]

This case demonstrates that an effort by one firm to take advantage of another firm's or venture's attempted output reduction cannot be the type of free riding that antitrust countenances as a defense. The firm that enters a market subject to collusion or restraints on innovation is certainly "free riding" in the sense that the restraint creates an opportunity for profit. But this is the very mechanism by which antitrust

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[10] (...continued)
product complementarity. Bakers sell more bread because dairies have developed and sell butter, but this does not mean that bakeries are "free riding" on dairies. Rather, the value of each product is enhanced because the other exists. The same thing is true of automobiles and gasoline, stereo sets and compact discs, computer hardware and computer software, and numerous other pairs of complementary products. In *Kodak*, the mere fact that the plaintiffs installed parts that the defendant had made was not "free riding." It was simple product complementarily. *Eastman Kodak Co. v. Image Technical Servs.*, 112 S. Ct. 2072, 2092 (1992).

[11] In conflict with the Tenth Circuit, several other circuits have recognized the importance of factual scrutiny of free-rider claims. *See, e.g., Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1010-12 (3d Cir. 1994) (free rider defense to agreement among full service wallpaper dealers in association may have been pretextual; fact issue created), *cert. denied*, 115 S. Ct. 1691 (1995); *Big Apple BMW, Inc. v. BMW of North Am., Inc.*, 974 F.2d 1358, 1377 (3d Cir. 1992) (if evidence suggests that free rider claim is pretextual, jury must decide), *cert. denied*, 113 S. Ct. 1262 (1993); *Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.*, 826 F.2d 712, 721 (7th Cir. 1987) (jury entitled to determine applicability of offered free rider defense); *Com-Tel, Inc. v. DuKane Corp.*, 669 F.2d 404, 410-12 (6th Cir. 1982) (fact finder entitled to reject free rider claim where horizontal restraint was imposed selectively).

encourages the breakdown of anticompetitive horizontal arrangements. In short, such actions should be encouraged, not ruled out as a matter of law.[12]

B. Consumers Require Antitrust Rules that Examine Less Restrictive Alternatives with Care.

Even if a rule imposed by a joint venture which collectively wields market power appears to promote the efficiency of the venture by protecting the venture from free riding, the inquiry should not end. Instead, courts should examine whether a less threatening alternative was reasonably available that would have accomplished substantially the same result. The examination of less restrictive alternatives operates as an Occam's Razor that permits the court to pare off intractable issues and can eliminate or reduce the balky process of "balancing" the benefits and harms to consumers posed by a restraint.

Unfortunately, courts and commentators are deeply split about both the necessity and the nature of the "less restrictive alternative" inquiry.[13] In this case, the Tenth Circuit did not

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[12] *See Premier Elec. Constr.*, 814 F.2d at 370 (noting that competing with a cartel is a form of "free riding," but antitrust must countenance it because this is the way the cartel unravels).

[13] *Compare, e.g., Sullivan v. NFL*, 34 F.3d 1091, 1103 (1st Cir. 1994) (requiring "less restrictive alternative" analysis), *cert. denied*, 115 S. Ct. 1252 (1995) *and Los Angeles Memorial Coliseum Comm'n v. NFL*, 726 F.2d 1381, 1396 (9th Cir.) (same), *cert. denied*, 469 U.S. 990 (1984) *and Kreuzer v. American Academy of Periodontology*, 735 F.2d 1479 (D.C. Cir. 1984) (same) *and North Am. Soccer League v. NFL*, 670 F.2d 1249, 1261 (2d Cir.) (same), *cert. denied*, 459 U.S. 1074 (1982), *with, e.g., American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1249 (3d Cir. 1975) (rejecting "less restrictive alternative" test; restraint permissible if it is "reasonably necessary.") *and National Bancard Corp. v. Visa U.S.A., Inc.*, 596 F. Supp. 1231,

(continued...)

even consider whether any less restrictive alternative was available to address Visa's claimed free rider concerns. Had it, the court would have determined that Visa already had in place mechanisms that addressed the free riding concerns it expressed. Visa's existing fee structure could readily be used to reflect the differing levels of investment made by new and old members. Likewise, Visa's concern with confidential information could be remedied by the simple expedient of keeping Dean Witter off the Visa Board, a practice already followed by Visa for members of the MasterCard Board. The court would not have had to look far to find mechanisms less injurious to consumers to protect Visa's asserted interests.

We ask that the Court resolve the confusion and conflict among the lower courts (1) by defining the proper scope of defenses to agreements among competitors restraining competition; (2) by determining whether free rider claims must be carefully defined and factually supported by the record, with the fact finder entitled to decide reasonably disputable facts; and (3) by determining whether this query requires a determination that no reasonably workable less restrictive alternative would accomplish the same goal.

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[13] (...continued)
1256-57 (S.D. Fla. 1984) (rejecting "least restrictive" test for a "fairly necessary" test), *aff'd*, 779 F.2d 592 (11th Cir.), *cert. denied*, 479 U.S. 923 (1986). *See also* Department of Justice & Federal Trade Commission, *Antitrust Guidelines for the Licensing of Intellectual Property* § 4.2 (1995) ("The existence of practical and significantly less restrictive alternatives is relevant to a determination of whether a restraint is reasonably necessary."); 7 Phillip E. Areeda, *Antitrust Law* ¶ 1505b (1986) (same).

CONCLUSION

For the foregoing reasons, the 27 consumer organizations submitting this brief as *amici curiae* respectfully urge that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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